STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

In re the Marriage of

Scott Petinga,

Petitioner / Father,

And

Joanna Katarzyna Pluszcz.

Respondent / Mother.

Court File No.: 27-FA-16-950
Case Type: Dissolution with Children

MEMORANDUM OF LAW

STATEMENT OF THE ISSUE

1. The legal issue raised is whether the 25% parenting-time provision found in Minn. Stat. § 518.175 Subd. 1(g) violates the Due Process clause of the Fourteenth Amendment.

SUMMARY OF THE ARGUMENT

The 25% parenting-time presumption—codified in Minn. Stat. § 518.175 Subd. 1(g)—violates the Due Process clause of the Fourteenth Amendment because it does not adequately protect a fit parent's fundamental liberty interest in the care, custody and control of their child. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

Instead, the statute impermissibly burdens parents' fundamental parental rights by: 1) forcing the parents to demonstrate that additional parenting time is in the "best interests" of the child, 2) without a prior determination of unfitness as a parent.

In order for this statute to pass constitutional muster—since it touches on a "fundamental liberty interest," the state must: 1) demonstrate a "compelling interest," 2) apply "strict scrutiny" upon review with a clear and convincing standard, and 3) avoid statutory constructions which are "void for vagueness."

This statute does not pass the above three-pronged test, as will be shown below.

ARGUMENT

I. PARENTING TIME IS A "FUNDAMENTAL" RIGHT

This Court has long asserted that parent's rights to raise and educate their children is a "fundamental" type of "liberty" protected by the Due Process Clause. See generally, *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

This liberty includes the "right to the care, custody, management and companionship of [his or her] minor children" which is an interest "far more precious than… property rights" *May v. Anderson,* 345 US 528, 533 (1952). (where a mother had her rights to custody jeopardized by a competing custody decree improperly obtained in another state).

This was further clarified by Justice White in *Griswold v. Connecticut,* 381 U.S. 479, 502 (1965, concurring opinion) ("[T]his Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right to marry, establish a home and bring up children, and the liberty… to direct the upbringing and education of children," (internal quotes omitted) and that these are among "the basic civil rights of man." (citations omitted). He then added that "[t]hese decisions affirm that there is a realm of family life which the state

cannot enter without substantial justification." (citing from *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

The fundamental nature of parental rights was revisited in *Troxel v. Granville*, 530 U.S. 57 (2000) using such strong affirmations as "[t]he fundamental liberty interests recognized liberty interest at issue… is perhaps the oldest of this Court… [I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id*. at 65, 66.

In *Troxel*, Justice Souter then expands on this right contained in the Fourteenth Amendment before noting that the constitutionality of parental rights is a "settled principle";

> We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment. See, *e.g., Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925); *Stanley* v. *Illinois,* 405 U. S. 645, 651 (1972); *Wisconsin* v. *Yoder,* 406 U. S. 205, 232 (1972); *Quilloin* v. *Walcott,* 434 U. S. 246, 255 (1978); *Parham* v. *J. R.,* 442 U. S. 584, 602 (1979); *Santosky* v. *Kramer,* 455 U. S. 745, 753 (1982); *Washington* v. *Glucksberg,* 521 U. S. 702, 720 (1997). As we first acknowledged in *Meyer*, the right of parents to "bring up children," 262 U. S., at 399, and "to control the education of their own" is protected by the Constitution, *id.*, at 401. See also *Glucksberg, supra,* at 761. Id. at 77.

Even the dissenting opinions of *Troxel* recognize **with unanimity** the principle that parental rights are constitutionally protected fundamental rights. Justice Scalia noted they rise to the level of being "among the unalienable Rights with which the Declaration of Independence proclaims all Men ... are endowed by their Creator… [T]hat right is also among the othe[r] [rights] retained by the people which the Ninth Amendment says the Constitution's enumeration of rights shall not be construed to deny or disparage." (internal quotes removed) Id. at 91. Justice Kennedy acknowledged that "visitation cases may arise where [considering appropriate protection by the

state] **the best interests of the child standard would give insufficient protection to the parent's constitutional right to raise the child without undue intervention by the state…"** Id. at 94. (emphasis added). Justice Kennedy then clarifies that the court is in unanimous agreement about parental rights;

> [T]here is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: As our case law has developed, the [parent] has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment. See, *e.g.*, *Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534-535 (1925); *Prince* v. *Massachusetts,* 321 U. S. 158, 166 (1944); *Stanley* v. *Illinois,* 405 U. S. 645, 651-652 (1972); *Wisconsin* v. *Yoder,* 406 U. S. 205, 232-233 (1972); *Santosky* v. *Kramer,* 455 U. S. 745, 753-754 (1982). *Pierce* and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion. …[T]hey long have been interpreted to have found in Fourteenth Amendment concepts of liberty an independent right of the parent in the "custody, care and nurture of the child," free from state intervention. *Prince, supra*, at 166. Id. at 95.

II. STRICT JUDICIAL SCRUTINY IS THE APPROPRIATE STANDARD FOR REVIEWING LEGISLATIVE ACTS THAT INTERFERE WITH FUNDAMENTAL CONSTITUTIONAL RIGHTS[1]

In *Shapiro v. Thompson, 394 U.S. 618 (1969),* writing for the Court, Justice Brennan held "any classification which serves to penalize the exercise of [a fundamental constitutional] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."[2] In support of this proposition, Justice Brennan offered a "cf." citation to *Skinner v. Oklahoma*, *Korematsu v. United States*, *Bates v. Little Rock*, and *Sherbert v. Verner*.

[1] *Shapiro v. Thompson, 394 U.S. 618 (1969).*
[2] *Id. at 634.*

Less than two months after *Shapiro*, the Supreme Court substantially repeated its formulation of the strict scrutiny test in *Kramer v. Union Free School District No. 15*, a case involving voting rights under the Equal Protection Clause. Because the right to vote was fundamental, the Court said, it "must determine whether the exclusions [of some from the opportunity to vote] are necessary to promote a compelling state interest."

With the decisions of *Shapiro* and *Kramer* in 1969, if not before, strict scrutiny had assumed its modem doctrinal form: To satisfy strict scrutiny, the government must demonstrate a compelling interest, and it must further show that a challenged statute or regulation is either necessary, narrowly drawn, or narrowly tailored to protect that interest.

"Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. The law must be shown necessary, and not merely rationally related to, the accomplishment of a permissible state policy."

The Court has unequivocally stated, there is a "realm of family life which the state cannot enter without substantial justification" (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166). *Griswold v. Connecticut,* 381 U.S. 479, 493 n7 (1965).

Absent a **powerful** countervailing interest, the state has no legal reason to treat either parent differently. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975) (*nemine contradicente* – no dissenting opinions) ("[A] father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection'", citing from *Stanley v. Illinois, 405 U.S. 645, 651* (1972)).[3]

[3] This *Stanley* citation related to parental rights has also been cited in *Lassiter v. Department Of Social Services*, 452 U.S. 18, 27 (1981) ("This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to "the companionship, care, custody, and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection…

> "[S]trict judicial scrutiny… has [been] found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications. If, as previous decisions have indicated, strict **scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a "heavy burden of justification**," **that the State must demonstrate that its [system affecting fundamental liberties] has been structured with "precision," and is "tailored" narrowly to serve legitimate objectives and that it has selected the "least drastic means" for effectuating its objectives..."** (emphasis added) (footnotes omitted) (*San Antonio School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

San Antonio School District confirmed that where a "fundamental liberty" interest was at issue, the issue demanded review by the courts using strict scrutiny. ("[T]he State's system impermissibly interferes with the exercise of a "fundamental" right and that accordingly the prior decisions of this Court require the application of the strict standard of judicial review. *San Antonio School District* id. at 29). See also *Bernal v. Fainter*, 467 U.S. 216, 216-217 (1984). ("In order to withstand strict scrutiny, the law must advance a compelling state interest by the **least restrictive means available**.").

"When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is **closely tailored to effectuate only those interests."** *Zablocki v. Radhail*, 434 U.S. 374, 388 (1978). In *Troxel* regarding parental rights Justice Thomas confirmed that "the appropriate standard of review..." is to "apply strict scrutiny to infringements of fundamental rights."

Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision. "); see also Santosky v. Kramer, 455 U.S. 745 (1982); M.L.B. v. S.L.J.519 U.S. 102 (1996)

III. MINN. STAT. §518.175 SUBD. 1 (g) FAILS STRICT SCRUTINY BECAUSE LESS RESTRICTIVE MEANS ARE AVAILABLE [4]

State action that implicates a fundamental right cannot justify itself simply on the basis of serving a "compelling state interest." Instead, the state must show its implication of a fundamental right both serves a compelling state interest and is narrowly tailored.

The narrow tailoring requirement insists that infringements of protected rights must be necessary in order to be justified.[5] The Supreme Court sometimes expresses essentially the same demand when it says that the government's chosen means must be "the least restrictive alternative" that would achieve its goals.[6] A law would not be necessary to achieve its ends if the government could accomplish the same result while inflicting lesser burdens on protected rights.[7]

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[4] For the purposes of this brief, the protection of children is a non-disputed "compelling state interest."*See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 755 (1996) (plurality opinion) ("We agree with the Government that protection of children is a 'compelling interest.'"). *See, e.g.,* Ashcroft v. ACLU, 542 U.S. at 689 (Breyer, J., dissenting) (finding that protecting children from commercial pornography is a compelling governmental interest); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 755 (1996) (plurality opinion) ("We agree with the Government that protection of children is a 'compelling interest.'"); Sable Commc'ns v. FCC, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.").

[5] *See, e.g.,* Republican Party of Minn. v. White, 536 U.S. 765, 775 (2002) ("[To show that the [statute] is narrowly tailored, [the government] must demonstrate that it does not 'unnecessarily circumscrib[e] protected expression.' (fourth alteration in original) (quoting Brown v. Hartlage, 456 U.S. 45, 54 (1982))); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632 (1969) ("[T]he classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal.").

[6] Ashcroft v. ACLU, 542 U.S. at 666; *Playboy,* 529 U.S. at 815; *Sable Commc'ns,* 492 U.S. at 126; *see* Fla. Star v. B.J.F., 491 U.S. 524, 538 (1989) (striking down a governmental action in part because less speech-restrictive alternatives were available); Volokh, *supra note* 322, at 2422.

[7] The necessity or narrow tailoring requirement may explain why the Supreme Court has demanded that a government body explore race-neutral alternatives before implementing an affirmative action plan. At least one prominent commentator has expressed puzzlement about this requirement: "The Court's preference for 'race-neutral means to increase minority participation' is inconsistent with narrow tailoring" because "[e]xtending affirmative action subsidies to non-victim whites produces less-tailored, over-inclusive programs." Ayres, *supra* note 322, at 1784. If this criticism fails, it must be because the Court believes that a race-neutral program would not infringe any triggering right at all and, accordingly, that infringement is not necessary for the government to accomplish its compelling goal. This is of course a controversial conclusion in view of the Court's suggestion in Washington v. Davis, 426 U.S. 229 (1976), that a facially neutral statute adopted for racially discriminatory reasons would trigger strict judicial scrutiny. *See id.* at 241-42. So far, however, the Court has never held or had occasion to hold that a

Here, the State cannot show Minn. Stat. § 518.175 Subd. 1(g) is narrowly tailored; nor can the State show Minn. Stat. § 518.175 Subd. 1(g) is legislating using the least restrictive means. Articulating the same standard differently, the State cannot carry its burden to show Minn. Stat. § 518.175 Subd. 1(g) is necessary to achieve a "compelling state interest."

First, this analysis begs the question: what is the compelling state interest undergirding Minn. Stat. § 518.175 Subd. 1(g)? However vague, the undisputed purpose of this statute is to effectuate the "best interests of the child." The statutory regime itself doesn't announce the purpose explicitly, but in context—specifically in light of Minn. Stat. §518.17—this is the clear and demonstrated intent of the statute.

Second, the key question is one of narrow-tailoring: what less restrictive alternatives equally advance the government's interest in serving the best interests of the children? If less restrictive alternatives exist, then Minn. Stat. § 518.175 Subd. 1(g) is unconstitutional.

First, it's analytically necessary to underscore what and precisely how Minn. Stat. § 518.175 Subd. 1(g) restricts. These are two separate inquiries, each easily explicated.

First, regarding what is restricted: Minn. Stat. § 518.175 Subd. 1(g) restricts parenting time. More specifically, it restricts the rebuttable presumption of parenting time. That is, during a divorce or custody action, this statute allocates the time a parent will spend with his or her child(ren).

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facially race-neutral affirmative action plan would trigger the same strict judicial scrutiny as a facially race-based affirmative action plan.

Second, regarding how restriction is occurring, Minn. Stat. § 518.175 Subd. 1(g) sets a (rebuttable) presumptive minimum parenting time at 25%. As a percentage, this restriction is quantitative. As a quantitative value (percentage), comparison to other regimes is made particularly easy. That is, an analysis can compare a 25% presumption to a 50% presumption, for example, because they are both numerical values.

This analysis now turns to the task of identifying and examining whether and what less restrictive alternatives exist. This task is decidedly not difficult.

Consider a 26% rebuttable presumption of parenting time, for example. Or, a 27% presumption. Or, a 50% presumption.

If any one of these alternatives accomplishes the stated "compelling interest" of serving a child's best interests, then the 25% presumption is not, by definition, the least restrictive statutory regime.

Additionally, it's essential to point out, per the requirements of strict scrutiny, the State bears the burden of showing the 25% presumption is the least restrictive means—a task which cannot be performed.

Our analysis will begin with the 50% presumption. A 50% presumption means, upon dissolution or separation, parents would each receive equal parenting time, consistent with and not burdening their fundamental rights as parents. This—a 50% presumption— is the least restrictive means for at least three reasons.

First, consider a narrow-tailoring analysis. In other words, let's perform the math. A 50% presumption offers 25% more parenting time than a 25% presumption. The

question is whether or not it achieves the same goal. What goal? The goal of serving the best interests of the child. If the 25% and 50% presumption equally achieve this goal, the 50% is less restrictive and, therefore, Minn. Stat. § 518.175 Subd. 1(g) is unconstitutional.

The 50% presumption not only equally achieves this goal of effectuating the best interests of the child, it outperforms the 25% presumption. The research unequivocally confirms that **more equal parenting yields more positive outcomes for children**. For example, studies show:

- Children living in shared custody are less stressed than their counterparts who live full-time with one parent[8];
- Preschool children aged 3 to 5 in joint physical custody have fewer psychological problems than those who live mostly or only with one parent[9]; and
- Adolescents in shared parenting families make better grades, are less depressed, and are more well-adjusted behaviorally than adolescents who live primarily with their mother[10]
- Adolescents in shared parenting families score better in measures of depression, anxiety, substance use, antisocial behavior, truancy, cheating, and delinquency than those other children of divorce.[11]
- Adolescents in shared parenting families are less likely to be stressed by the need to take care of their mother.[12]

[8] Stockholm University. "Shared custody equals less stress for children." ScienceDaily. ScienceDaily, 30 August 2017. www.sciencedaily.com/releases/2017/08/170830094228.html.
[9] Uppsala Universitet. "Fifty–fifty split best for children of divorce, study suggests." ScienceDaily. ScienceDaily, 7 September 2017. www.sciencedaily.com/releases/2017/09/170907104302.htm
[10] Buchanan, C., & Maccoby, E. (1996). *Adolescents after divorce*. Cambridge, MA: Harvard University Press.
[11] *Id.*
[12] *Id.*

- Adolescents in shared parenting families are less depressed, have fewer health problems and stress-related illnesses, and are more satisfied with their living arrangement than children in sole residence families[13]
- Children do better on a broad measure of wellness – covering emotional health, physical health, academic achievement and more – if their parents follow a shared parenting plan after separating;[14]
- As adolescents' amount of overnight time increases, so too does positive ratings of their relationships with their fathers.[15]
- Adolescents in shared parenting children have more close friends and fewer problems making friends.[16]
- Shared adolescents are less likely to smoke, to be depressed, to engage in antisocial behavior, or to have low self-esteem.[17]
- Children of joint physical custodians tend to feel less rejected by their parents and report feeling more loved by both parents and attached to both parents.[18]

[13] *Id*.
[14] Nielsen, Linda. "Ten Surprising Facts on Shared Parenting After Divorce or Separation." 20 June 2017. https://ifstudies.org/blog/10-surprising-findings-on-shared-parenting-after-divorce-or-separation. "My review of 54 studies on shared parenting finds that, independent of parental conflict and family income, children in shared physical custody families—with the exception of situations where children need protection from an abusive or negligent parent—have better outcomes across a variety of measures of well-being than do children in sole physical custody."
[15] Fabricius, W., Sokol, K., Diaz, P., & Braver, S. (2012). Parenting time, parent conflict, parent–child relationships and children's physical health. In R. Kuehnle & R. Drozd (Eds.), *Parenting plan evaluations: Applied research for the family court* (pp. 188–214). Cambridge, UK: Oxford University Press.
[16] Jablonska, B., & Lindberg, L. (2007). Risk behaviors and mental distress among adolescents in different family structures. *Social Psychiatry and Epidemiology*, *42*, 656–663.
[17] Breivik, K., & Olweus, D. (2006). Adolescent's adjustment in four family structures. *Journal of Divorce & Remarriage*, *44*, 99–124.
[18] Cowan, D.B., Mother Custody Versus Joint Custody: Children's Parental Relationships and Adjustment, doctoral dissertation, University of Washington (1982); Lehrman, I., Adjustment of Latency Age Children in Joint and Single Custody Arrangements, summarized in 50 DISSERTATION ABSTRACTS INTERNATIONAL 8 (February 1990); Leupnitz, D.A., CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE (1982); Leupnitz (1986), supra.

- Children adjust better to their parent's separation or divorce when joint physical custody is awarded than when an award of sole custody is made to one parent with visitation to the other.[19]

The research is clear: equal and shared parenting is far, far, far better for children than unequal parenting time. In other words, a child's best interests (absent findings akin to abuse or endangerment) requires a 50% parenting presumption, *not* a 25% presumption. It's instructive to, if only briefly, to examine the primary reason why this is the case.

A 50% presumption is in the best interests of children (and their parents) for many reasons. First, since joint custody treats both parents as equals, rather than as victor and vanquished, joint custodial parents tend to treat each other with more respect and less resentment. Meanwhile, 50% of their counterparts in sole custody situations actively try to sabotage the other party's relationship with their children.[20] Second, biology favors shared and equal joint parenting.[21] That is, the beneficial effects of dual parent contact begin from the time a child is born. The more frequently a father visits a prematurely born infant, for example, the more rapidly the child gains needed weight and becomes healthier, and the better the infant's

[19] See, e.g., Ferreiro, B., Presumption of joint custody: A family policy dilemma, 39 FAM. RELATIONS 420 (1990); Glazer, S., Joint custody: Is it good for the children? 39 EDITORIAL RES. REP. 58 (1989); Pearson, J. and Thoennes, N., Custody after divorce: Demographic and attitudinal patterns, 60 AM. J. OF ORTHOPSYCHIATRY 233 (1990); Wolchik, S., Braver, S. and Sandler, I., Maternal versus joint custody: Children's postseparation experiences and adjustment, 14 J. OF CLINICAL CHILD PSYCHOLOGY 5 (1985); Shiller, V.M., Loyalty Conflicts and Family Relationships in Latency Age Boys: A Comparison of Joint and Maternal Custody, 9 J. DIVORCE 17, 37 (1986).

[20] Wallerstein, J. and Kelly, J., SURVIVING THE BREAKUP (1980), at 125.

[21] Levy-Shiff, R., et. al., Fathers' Hospital Visits to their Preterm Infants as a Predictor of Father-Infant Relationship and Infant Development, 86 PEDIATRICS 291-92 (1990). By the age of 6 months, the more interaction a boy has with both parents, the higher his mental competence and psychomotor functionality, and the more trust and verbal openness he displays. Pederson, Rubenstein and Yarrow, supra; Yarrow, L.J., et. al, Cognitive and Motivational Development in Early Childhood, in B. Z. Friedlander, et. al., 3 EXCEPTIONAL INFANT (1974). The overall adjustment of children of all ages--of joint custodians is similar to that of children in happy, intact families. Pojman, E.G., Emotional Adjustment of Boys in Sole Custody and Joint Custody Compared with Adjustment of Boys in Happy and Unhappy Marriages, doctoral dissertation, California Graduate Institute, Los Angeles, Calif. (1982).

social-personal development and ability to adapt, even when the infant had not had more maternal contact. Additionally, a 50% parenting time presumption has myriad collateral benefits: including lower overall divorce rates,[22] higher rates of child support compliance,[23] greater overall parental health,[24] reducing litigation, thereby reducing the strain on court resources and the stress on children.[25]

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[22] Data from the National Center for Health Statistics show a decline in divorce rates following a StateVs adoption of laws mandating or encouraging joint custody awards. bStates with higher levels of joint custody had an average four-year decline in the divorce rate approximately double that for states with medium levels of joint custody and the percentage decline in the divorce rate over the same period was eight times greater in States with high levels of joint custody awards as compared to the percentage decline in divorces in States with low levels of joint custody awards.c Kuhn, R. and Guidubaldi, J., Child Custody Policies and Divorce Rates in the United States, paper presented at the 11th Annual Conference of the ChildrenVs Rights Council, Washington, D.C., October 23-26, 1997.1

[23] Only about one-half of fathers who are denied access to their children comply with their child support obligations, and less than half (46%) of mothers with sole physical custody receive all court-ordered payments of child support over the course of a year. By contrast, the highest level of child support compliance has been found to occur in situations where the parties have been awarded joint physical custody of their children. Scoon-Rogers and Lester, supra; Furstenberg and Zill, supra. Another study found that 30% of mothers with sole physical custody reported a total absence of child support payments over a twelve- month period, while the percentage in joint physical custody cases was zero (0%.) Pearson, J. and Thoennes, N., Supporting children after divorce: The influence of custody on support levels and payments, 22 FAM. L. Q. 319, 329 (Fall, 1988). That is to say, parents with a joint physical custody arrangement can always count on the other party's compliance with their child support obligations, while 30% of sole custody parents cannot. On the average, sole custody mothers reported receiving 63 percent of what they were owed. For joint legal/maternal residential custody and joint residential custody parents, the percentages were 81 and 95 percent, respectively. Phrased somewhat differently, 31 percent of the mothers with sole custody and 20 percent of those with joint legal/maternal residential custody reported receiving no more than half of what they were owed. There were no instances in which fathers with joint residential custody were reported to have met less than half of their support obligation. Thus, when child support was ordered in a case calling for joint residential custody, this obligation was typically met. Ibid. at 330. And the best payment patterns [are] exhibited by those with joint residential and joint legal arrangements. Patterns for absent fathers with sole maternal custody arrangements [are] the least favorable....c Id. at 335. In terms of child support compliance, mothers with joint residential custody [are] significantly better off than their counterparts with sole custody. *Id*. at 329.

[24] Luepnitz, D., A comparison of maternal, paternal and joint custody: Understanding the varieties of post-divorce family life, 9 J. OF DIVORCE 1 (1986). Joint custody also eases the emotional and financial strain of raising children alone. Folberg, J., JOINT CUSTODY AND SHARED PARENTING (1984). By contrast, sole custody awards have the effect of generating feelings of inadequacy, often with the result that parents begin to feel awkward or ill at ease with their children. Donnelly, D. and Finkelhor, D., Does Equality in Custody Arrangement Improve the Parent-Child Relationship?, 54 J. OF MARRIAGE AND THE FAM. 837, 838 (November, 1992), citing Stewart, J., Schwebel, A. and Fine, M., The impact of custodial arrangement on the adjustment of recently divorced fathers, 9 J. OF DIVORCE 55 (1986). Overall, parents who are awarded joint physical custody experience less emotional loss, depression, grief, anger and role discontinuity. Steinman, S., The Experience of Children in a Joint-Custody Arrangement: A Report of a Study, 5 AM. J. ORTHOPSYCHIATRY 403, 404 (1981); Steinman, S., Joint Custody: What we know, what we have yet to learn, and the judicial and legislative implications, 16 U.C. DAVIS L. REV. 739 (1983).

[25] It has been found that it is the sole-custody-with-visitation arrangement, not joint custody, that generates more litigation and relitigation of issues. Ilfeld, Ilfeld and Alexander, Does Joint Custody Work? A First Look at Outcome Data of Relitigation, 139 AM. J. PSYCHIATRY 62 (1982); Ferreiro, B.W., Presumption of Joint Custody: A Family Policy Dilemma, 39 FAM. REL. 420, 422 (1990); Schepard A., Taking Children Seriously: Promoting Cooperative Custody After Divorce, 64 TEX. L. REV. 687, 717 (1985). The notion that joint custody creates conflict is wrong. The American Psychological Association reports that joint custody couples actually experience less conflict than

Having established that equal and shared parenting is far, far, far better for children than unequal parenting time, this means that a 25% presumption is less effective at achieving the stated aim of protecting children than a 50% presumption. This means that a 25% presumption is less effective at achieving the stated aim of protecting children than a 50% presumption. Moreover, not only does a 50% presumption of parenting time better serve children, it does not trample a parent's fundamental right.

Here, at this juncture, the analysis may grind to a halt. The research is clear. There is no door through which Minn. Stat. § 518.175 Subd. 1(g can walk through and survive constitutional muster.

That is, a 50% rebuttable parenting time presumption not only equally achieves this goal of effectuating the best interests of the child, it outperforms the 25% presumption in the arena of a child's best interests.

In other words, the State fails the least-restrictive means test because of the following basic math: a 50% presumption yields better outcomes and is less restrictive than a 25% presumption.

In order to strike down Minn. Stat. § 518.175 Subd. 1(g), that's the only calculation that must be made. To be even more precise: a 50% presumption is the least restrictive means possible, and the most most beneficial to children and parents along multiple metrics.

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parents who are involved in a sole-custody- with-visitation arrangement. Willenz, Pam, bChildren likely to be better adjusted in joint vs. sole custody arrangements in most cases, according to review of research,c Press Release, Am. Psychological Assoc. Public Affairs Office (March, 2002). This makes sense, given that it is only the sole custody arrangement that requires one parent to be the winner and the other parent the loser. It also stands to reason that this would be the case because joint custody enables a shift of focus from oneVs own interests to those of oneVs child, thereby encouraging mature behavior and discouraging divisive, childish conflict. Potash, Marlin S., Psychological Support for a Rebuttable Presumption of Joint Custody, 4 PROB. L. J. 17 (1982).

Additionally, and intriguingly, the Supreme Court has already made this very same pronouncement: stating that a 25% presumption is antithetical to the stated goal of serving the child's best interests.

> The State registers no gain towards its declared goals when it separates children from the custody of fit parents. *Santosky v. Kramer*, 455 US 745, 766-67 (1982)(emphasis added).

"No gain" is absolute language, free of ambiguity. *Santosky* stands for the proposition that: "No gain" is registered when the state "separates children from the custody of fit parents." *Id.* Here, Minn. Stat. §518.175 does precisely that: "separates children from the custody of fit parents." That is, without requiring a showing that a parent is not "fit," the Statute only guarantees a rebuttable presumption of 25% parenting time. This separates children from the custody of fit parents. And, according to *Santosky,* the result is "no gain."

THEREFORE, THE ONLY CUSTODIAL DETERMINATION FOR TWO FIT PARENTS, IS EQUAL 50-50 REBUTTABLE CUSTODY PRESUMPTION. THIS SURVIVES "STRICT SCRUTINY," DOES NOT VIOLATE DUE PROCESS, AND IS IN THE "BEST INTERESTS OF THE CHILD"

Because the Minnesota statutory regime embodied in § 518.175 Subd. 1(g) only establishes a presumption of 25% parenting time, it does not adequately protect a parent's opportunity to form a relationship with his child.

To the contrary, the statute peremptorily deprives fundamental parental rights without a determination of unfitness as a parent. As such, the statutory scheme violates the Due Process clause. *Lehr*, supra at 262-63.

As the *Stanley* Court put it, "Procedure by presumption is always cheaper and easier than individualized determination…" but the Constitution recognizes higher values than speed and efficiency. *Stanley*, supra, 405 U.S. at 656-657.

CONCLUSION

In conclusion, the Court's authority to strike down this statute as unconstitutional is a part of a "solemn duty" to bring statutes into constitutional compliance, as the court noted in *Mugler v. Kansas,* 123 U.S. 623, 661 (1887);

> "It belongs to [the legislature]... to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety... There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, *(Sinking Fund Cases*, 99 U.S. 718 ,) **the courts must obey the constitution rather than the law-making department of government**, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed."

This Petitioner urges the Court to obey the mandates of the Constitution. This Petitioner urges the Court to protect the sacred right of parents. This Petitioner urges the Court to act in the best interests of children—and parents alike. By every measure, the research indicates that joint and equal shared parenting is in the best interests of the child.

For the reasons stated herein, Petitioner respectfully requests that Minn. Stat. § 518.175 Subd. 1(g be declared unconstitutional.

Minn. Stat. § 518.175 Subd. 1(g) is unconstitutional on its face insofar as it violates the Due Process clause of the Fourteenth Amendment. As such, the statutory language should be amended to reflect a rebuttable presumption of shared and equal parenting time. Specifically, "25%" should be stricken and replaced with "50%"

Respectfully Submitted,

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/ s / Ryan McLaughlin Dated: March 3, 2021

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